

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24242-1-III
)	
Respondent,)	
)	
v.)	Division Three
)	
LISA A. DAHLMAN,)	
)	
Appellant.)	UNPUBLISHED OPINION

KATO, J.—Lisa Ann Dahlman appeals her conviction of one count of possession of a controlled substance. She contends the elements instruction to the jury was defective. We affirm.

On August 20, 2004, Deputy Sheriff Ryan Smith stopped Ms. Dahlman’s vehicle for making an improper turn. The deputy noticed the passenger in the car was asleep and not wearing a seatbelt. Deputy Smith asked Ms. Dahlman the passenger’s name. She told him it was Tom or Tim. The deputy went around the car and tried to wake the passenger. When there was no response, Deputy Smith opened the door and shook the passenger, who awoke and identified herself as Thomas Burkhart. The deputy later recognized her as being Rebecca

Lavelle.

The deputy arrested Ms. Lavelle for providing false information and asked her to get out of the vehicle. As she stepped out, he noticed a small, green, Ziplock bag lying on the seat. The bag contained cocaine. The deputy placed Ms. Lavelle in his patrol car. Ms. Dahlman was also arrested for driving without a license and placed in the patrol car.

While Ms. Dahlman was in the patrol car, Deputy Sheriff Tanya Walker read Ms. Dahlman her *Miranda*¹ rights. She waived them and told Deputy Walker the substance in the Ziplock bag was cocaine. She said Ms. Lavelle had purchased the cocaine the previous day and they had used the drug together on two occasions. Ms. Dahlman told the deputy the cocaine belonged to both of them and they were sharing the bag. She also told the deputy she knew the cocaine was in the vehicle. Ms. Dahlman was charged with one count of possession of a controlled substance.

At trial, Ms. Lavelle testified she tucked the bag inside the waistband of her sweatpants at the time of the traffic stop. She and Ms. Dahlman had used the cocaine the day before. Ms. Lavelle said the cocaine belonged to her.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At the conclusion of the trial, the court instructed the jury on the elements of the crime:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

That on or about the 20th day of August, 2004, the defendant possessed a controlled substance; and,

Two, that the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Report of Proceedings at 90. The jury convicted Ms. Dahlman as charged. This appeal follows.

Ms. Dahlman contends the court erroneously instructed the jury. The court instructed that, to convict Ms. Dahlman of possession of a controlled substance, the jury must find she possessed a *controlled substance*. But the substance was not identified. Ms. Dahlman thus argues the elements instruction was defective because it only required the jury to find she possessed an unspecified uncontrolled substance. She claims the court should have instructed the jury it had to find she possessed cocaine in order to convict her of the crime.

We review claims of erroneous jury instructions de novo. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

The inquiry is whether they are supported by the evidence, allow the parties to argue their theories of the case, are not misleading to the jury, and properly set forth the applicable law. *Id.* The absence of an essential element of a crime in a jury instruction violates due process by relieving the State of its burden to prove every element. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). In particular, an instruction purporting to contain all the elements must in fact contain them all. *Donner v. Donner*, 46 Wn.2d 130, 134, 278 P.2d 780 (1955). We may not rely on other instructions to supply missing elements. *Mills*, 154 Wn.2d at 7.

The identity of a controlled substance is an essential element if it increases the maximum sentence. *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). But that is not the case here. RCW 69.50.401 specifies the penalties for offenses involving controlled substances. For example, an offense involving methamphetamine carries a maximum sentence of 10 years, but the maximum sentence for many other controlled substances, including cocaine, is 5 years. Former RCW 69.50.401(a)(1)(ii), (iii) (2002);² former RCW 69.50.401(d) (2002).³ Ms. Dahlman was sentenced to 8 days in jail and 12 months of community custody. The identity of the controlled substance she possessed did not increase

² Recodified as RCW 69.50.401(2)(b), (c) (2004).

³ Recodified as RCW 69.50.4013 (2004).

her maximum sentence. The jury instruction was not deficient and did not omit an essential element of the crime charged.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Sweeney, C.J.

Schultheis, J.